



## **INCREASED RISK OF OSHA REPEAT CITATION**

**By Mark A. Lies II\*  
& Daniel R. Flynn\*\***

### **INTRODUCTION**

The Occupational Safety and Health Act of 1970 ("Act") created the Occupational Safety and Health Administration ("OSHA") and charged it with promulgating and enforcing what would eventually amount to literally hundreds and, in some industries, thousands of federal and state regulations regarding occupational safety and health. As part of its enforcement mission, OSHA has the duty to inspect workplaces and to issue citations to determine whether an employer is in violation of the Act, the regulations, or the General Duty Clause (Section 5(a)(1)). If OSHA issues a citation following an inspection, employers are frequently tempted to settle quickly and informally for a reduced penalty rather than contest the citation which may have no factual or legal support without considering future consequences. By foregoing potential factual and legal defenses for a quick and easy resolution of a citation involving an alleged violation

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\* Mark A. Lies, II, is a partner with the law firm of Seyfarth Shaw LLP, 131 South Dearborn Street, Suite 2400, Chicago, IL 60603 (312) 460-5877, mlies@seyfarth.com. He specializes in occupational safety and health and related employment and civil litigation.

\*\* Daniel R. Flynn is an associate with Seyfarth Shaw, (312) 460-5976, dflynn@seyfarth.com. His practice focuses on both occupational safety and health and environmental compliance and litigation matters.

of a specific regulation, however, can create a much larger risk in the future: a “repeat” citation with substantial monetary penalties. A repeat citation can carry a penalty up to \$70,000 per citation item (it should be noted that there are proposed amendments to the Act that will increase this amount substantially). This article will discuss what constitutes a repeat citation, including recent OSHA and Occupational Safety and Health Review Commission case law developments that unfortunately reflect a trend to increase an employers’ risk of receiving a repeat citation. The article will also provide practical advice on what employers can do to limit the possibility of receiving a repeat citation.

### **WHAT IS A REPEAT CITATION**

A repeat citation is a type of violation for which OSHA may cite an employer under section 17(a) of the Act if, as the name implies, OSHA has previously cited the employer for a “substantially similar condition” and the Occupational Safety and Health Review Commission has affirmed the previous citation. *See Secretary of Labor v. Potlatch Corp.*, 7 BNA OSHC 1061 (1979). Many employers are unaware of the nature of the various types of citations (General Duty Clause violation and/or violation of specific regulation) that can be considered “substantially similar” to be the basis for repeat citations. For example, OSHA can issue a repeat citation under the General Duty Clause<sup>†</sup> or base a repeat citation on a previous violation of the General Duty Clause. In its Field Operations Manual (FOM), OSHA states that, “hazards presenting serious

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<sup>†</sup> A General Duty Clause violation, Section 5(a)(1) of the Act, is not based upon a previously promulgated standard or regulation to address a defined “hazard”, rather, it can be extremely fluid as long as OSHA can prove that there is a “generally recognized hazard likely to cause serious injury or death” to an employee.

physical harm or death may be cited under the general duty clause (including ... repeated violations that would otherwise qualify as serious violations).” Field Operations Manual, CPL 02-00-148 (Jan. 9, 2009), p. 4-27; *see also Secretary of Labor v. Active Oil Service, Inc.*, 21 OSHC (BNA) 1184 (2005) (upholding a repeat citation of the General Duty Clause based on a previous citation based on the General Duty Clause). In addition, OSHA can base a repeat citation of a specific regulation upon a prior citation under the General Duty Clause. *Secretary of Labor v. GEM Industrial, Inc.*, 21 OSAHRC LEXIS 106 (1996) (ALJ decision) (stating that “a violation of a standard can be repeated even though based on a previous violation of the general duty clause”).

For those employers with more than one facility or worksite, an alleged repeat violation can occur at any of the employer’s facilities or worksites nationwide in federal jurisdictions, regardless of where the initial citation occurred. Federal OSHA must use federal OSHA citations as the basis for a repeat citation. The FOM states that “Prior citations by State Plan States cannot be used as a basis for Federal OSHA repeated violations. Only violations that have become final orders of the Review Commission may be considered.” (P. 4-32). OSHA maintains a national online database (which is available to the public at <http://www.osha.gov/pls/imis/establishment.html>) on which an OSHA Compliance Officer can, and will, search for any citations previously issued to an employer anywhere in the nation.

While there is not any statutory time limit concerning the length of time between the date on which the repeat citation is issued and the date of the previous citation on

which the repeat classification is based, set out in the Act, OSHA's policy states that, "the following policy shall generally be followed:

A citation will be issued as a repeated violation if:

- a. The citation is issued within 3 years of the final order date of the previous citation or within 3 years of the final abatement date, whichever is later; and
- b. If the previous citation was contested, within 3 years of the Review Commission's final order or the Court of Appeals final mandate.

FOM, CPL 02-00-148 (Jan. 9, 2009), 4-34. Despite this amended policy, OSHA has not always followed its policy, and the Review Commission has held that the three year time limitation contained in OSHA's Field Inspection Reference Manual ("FIRM")<sup>‡</sup> cannot be used as a defense to a repeat citation. *See, e.g., Secretary of Labor v. Active Oil Service, Inc.*, 21 OSHC (BNA) 1184 (2005) (holding that "[t]he Commission has long held that the amount of time between violations does not affect whether a violation is repeated.").

As indicated, repeat violations can carry proposed penalties of up to \$70,000. Thus, to an uninformed employer, what may seem like a harmless "serious" or "other than serious" citation, with a nominal or no proposed monetary penalty, which might be settled as a seemingly inconsequential matter, may lay the foundation for a subsequent repeat citation and a \$70,000 penalty at any of an employer's facilities or worksites

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<sup>‡</sup> OSHA's repeat citation policy was previously contained in its Field Inspection Reference Manual, CPL 02-00-103 (Sept. 26, 1994) ("FIRM"). OSHA recently replaced the FIRM with the Field Operations Manual ("FOM"). CPL 02-00-148 (Jan. 9, 2009).

across the nation for years to come. For this reason, many employers who realize this potential exposure are now aggressively defending any citation that is not legally or factually valid.

### **OSHA'S BURDEN OF PROOF**

OSHA has the initial burden of proof to demonstrate that the subsequent citation is "substantially similar" to the previous citation. The principle factor to be considered when determining whether a violation is repeated is whether the prior and instant violations resulted in "substantially similar hazards." *Secretary of Labor v. Stone Container Corp.*, 14 BNA OSHC 1757 (1990). Therefore, OSHA can attempt to meet its initial burden merely by demonstrating that the previous and current citations allege violations of the same standard. *Secretary of Labor v. Wal-Mart Super Center*, 20 OSHC (BNA) 1729 (2003). Unfortunately, the potential employer liability can be expanded because the two citations do not have to fall under the same specific standard – OSHA can meet its burden even if the two citations allege violations of different specific standards. This issue is clearly illustrated in the case of *Potlatch Corporation*, which sets forth the standard in determining whether OSHA has properly classified a citation as repeat, including the following example of two citations of separate standards that would nonetheless qualify as a repeat violation:

If two employees performing construction work such as painting were exposed to a 20 foot fall from an unguarded scaffold, the employer would be in violation of 29 C.F.R. § 1926.451(a)(4); a subsequent citation based on exposure of the same employees to a 20 foot fall while using the same unguarded scaffold to replace light bulbs would be a violation of 29 C.F.R. § 1910.28(a)(3).

*Potlatch*, 7 OSHC at 1063. In addition, the employees and the scaffold described in the *Potlatch* example above do not have to be the same. Rather, the two citations can involve completely separate employees at completely separate facilities across the country. Thus, anytime an employer voluntarily accepts a citation, including an informal settlement, OSHA may use the citation as the basis for a repeat citation involving not only the same standard, but also any substantially similar hazard in any of the employer's facilities anywhere in the nation.

### **HOW TO PROTECT YOUR EMPLOYEES AND YOUR BUSINESS FROM REPEAT CITATIONS**

Contesting a citation is one way to lessen the possibility of receiving a repeat citation in the future because it preserves the employer's factual and legal defenses and gives the employer's business time to correct any potential violations and ensure that they do not occur in the future. As discussed, settling a citation, even those classified as other than serious, can expose the employer to a potential repeat citation that will result in a penalty of up to \$70,000. Once a settlement agreement is entered into and affirmed by the Commission, the employer loses the right to contest those citations at any point in the future and can no longer raise any factual and legal defenses that may exist even if the prior citations form the basis for a future repeat citation. Therefore, contesting a citation where factual and legal defenses exist preserves the employer's rights and allows the employer to protect itself from receiving a repeat citation based on a factually or legally deficient citation.

Once an employer contests a citation, in good faith, it not only preserves the employer's opportunity to raise factual and legal defenses, but also it affords the

employer the opportunity to abate any other substantially similar hazards before the citations can be used as a basis for a repeat citation at the cited facility and elsewhere across the country.

If the employer settles a citation or it becomes the final order of the Commission following litigation, it is prudent to alert the employer's management at each of its facilities or worksites across the country of the cited hazard and thereafter take timely measures to abate the cited hazard and to prevent future employee exposure to the hazard. In addition, if the employer eventually agrees to accept a citation, the employer should attempt to have it amended and the Alleged Violation Description ("AVD"), which is the description of how the violation factually occurred contained in the body of the citation itself, carefully drafted to narrowly and accurately define the hazard to reflect the specific facts and circumstances of the hazard so that it will be difficult for OSHA to prove that the hazard alleged in any future citation is substantially similar to the hazard alleged in the prior citation.

### **DEFENSE OF A REPEAT CITATION**

If the employer is unfortunate enough to receive a repeat citation, it should develop a defense strategy to contest the classification of the citation as repeat; that is, that the new citation is not "substantially similar" to the prior citation. While the employer cannot defend the prior citations themselves, it must be prepared to put forward documentary and testimonial evidence to establish that the previously cited hazardous condition did not create a substantially similar hazard as contained in the repeat citation. Therefore, the employer should be prepared to argue that the prior

citation was not “substantially similar” to the present citation, as well as any other legal or factual defenses that may exist to the present citation.

### **CONCLUSION**

When an employer receives a citation from OSHA or a state occupational safety and health organization, it must carefully consider the potential for a repeat citation prior to settling the citation for any reason. Only after closely reviewing whether it has factual or legal defenses to the citation, and its obligation to abate any similar hazards in its facilities across the nation, should an employer consider settling a citation. If the employer accepts a citation without undertaking these considerations, the potential liability for a repeat citation will clearly exist in the future.